

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/12-01/18
Date: 15 January 2021

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR *v.* AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD**

PUBLIC

With Public Annex I-II and Confidential Annex III

**Public Redacted Version of “Registry Observations on Defence’s “Urgent Request for Custodial Visit on Compassionate Grounds” (ICC-01/12-01/18-1212-Conf)”,
filed on 22 December 2020**

Source: Registry

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Ms Melinda Taylor

Ms Kirsty Sutherland

Legal Representatives of the Victims

Mr Seydou Doumbia

Mr Mayombo Kassongo

Mr Fidel Luvengika Nsita

Legal Representatives of the Applicants

**Unrepresented Applicants
(Participation/Reparation)**

Unrepresented Victims

**The Office of the Public Counsel for
Victims**

**The Office of the Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Mr Harry Tjonk

**Victims Participation and Reparations
Section**

Other

Mr Nouhoum Sangare

I. Introduction

1. Following Trial Chamber X's ("Chamber") 18 December 2020 invitation to the Registry to provide observations on Defence request ICC-01/12-01/18-1212-Conf,¹ the Registry brings the Chamber's attention to the observations set out herein.

II. Procedural History

2. On 17 December 2020, and following information provided by the Defence on 15 December 2020 that the [REDACTED] daughter of Mr Al Hassan died from malaria on 14 December 2020, the Defence formally submitted before the Chamber its Urgent Request for Custodial Visit on Compassionate Grounds ("Request") requesting, *inter alia*, that the Chamber modify the location of Mr. Al Hassan's detention, on a temporary basis, to allow him to be detained on the territory of Mali, in order to see his family in person.²
3. On 18 December 2020, in noting the urgency of the Request, the Chamber shortened the deadline for responses by the Office of the Prosecutor and the Legal Representatives of Victims until 5pm on Tuesday 22 December, and invited the Registry to also provide observations by the same deadline.³
4. On 18 December 2020, and in order to prepare its observations, the Registry sought the Chamber's authorisation to disclose the Request to the relevant Malian authorities in order to obtain their input on a number of issues raised therein.⁴
5. On 18 December 2020, the Chamber clarified to the Registry that considering the time constraints for the purpose of the observations due on 22 December 2020, the Registry was invited to provide its observations as to the feasibility of

¹ E-mail from TCX dated 18 December 2020 and transmitted at 09:33.

² Defence, "Urgent Request for Custodial Visit on Compassionate Grounds", 17 December 2020, ICC-01/12-01/18-1212-Conf, para.1

³ E-mail from TCX dated 18 December 2020 and transmitted at 09:33.

⁴ E-mail from the Registry dated 18 December 2020 and transmitted at 16:02.

the Request from the Registry's side, and to indicate what would need to be pursued with the Malian authorities. The Chamber further specified that this request would be reconsidered in due course as required.⁵

III. Classification

6. The present submission is classified as confidential pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC") as it follows the Request which bears the same level of classification.

IV. Applicable law

7. For the purpose of the present submission the Registry has considered articles 68(1), 86, 87(1)(a)(2)(3)(4), 97 of the Rome Statute, rule 176(2) of the Rules of Procedure and Evidence, regulations 99(1)(i), 100 and 101 of the RoC, regulations 173, 174, 175, 179, 180, 183, 184, 200 and 202 *bis* of the Regulations of the Registry ("RoR") and article 44 of the "Headquarters Agreement between the International Criminal Court and the Host State".

V. Submissions

8. The Registry has taken note of the Request, it has noticed however that no specific information has been provided with regard to the exact timing and duration of the custodial visit by Mr Al Hassan. Considering the limited time available to submit these observations due to the urgency of the matter, in conducting its assessment on what is possible from the Registry's side in order to provide to the Chamber an accurate picture as possible of the current situation, and in gathering the relevant information, the Registry focused its efforts on addressing the following questions: Can the Registry facilitate the

⁵ E-mail from the Chamber dated 18 December 2020 and transmitted at 17:44.

transfer of Mr Al Hassan to Mali at this time, and if this is not possible, can the Registry offer any alternative modes of contact with the family?

Can the Registry facilitate the transfer of Mr Al Hassan to Mali at this time?- Relevant factors

A. Transfer operation to Mali and travel restrictions

Cooperation by the host State

9. Should the Chamber grant the Defence request to detain Mr Al Hassan in a secure custodial facility in Mali, in accordance with Article 44 of the *“Headquarters Agreement between the International Criminal Court and the host State”*, the Registry would request the Host State’s cooperation to transport Mr Al Hassan from the ICC Detention Centre (“ICC DC”) to [REDACTED] and *vice versa* for his return to the ICC DC.
10. The Registry does not foresee any obstacles in obtaining the requested cooperation from the host State.

International travel and travel restrictions

11. International travel from and to Mali resumed as of 25 July 2020. Travellers leaving, arriving, or transiting in Mali shall comply with the measures instated by the Malian Government in an effort to prevent the spread of COVID-19 including: (1) wearing a mask, (2) completing a health declaration form with contact information, travel history and health symptoms, and (3) presenting a negative COVID-19 test dated no more than seven days prior to arrival in Mali.
12. Although international travel from and to Mali has resumed, the following restrictions remain in place: Travellers who arrive without a negative COVID-19 test result or with a COVID-19 test result dated more than seven days before arrival will have their travel documents retained by airport officials and will be subjected to testing. Travellers must self-quarantine at home or at a hotel at their expense until the test result is available. Anyone suspected of having COVID-19, despite presenting a negative COVID-19 test result, will be subject to testing.

If test results are positive, that person's travel documents will be retained, and the traveller will be put into isolation in a government facility in Mali. The travel documents will be returned once the patient is deemed free of COVID-19.⁶

13. Prior to any consultation with the Malian authorities, the Registry expects that, should Mr Al Hassan be transferred to Mali, he will be at least requested to present a negative COVID-19 test dated no more than seven days prior to arrival in Mali. Additional COVID-19 measures may be imposed by the Malian authorities for Mr Hassan's arrival and detention in Mali.

[REDACTED]

14. [REDACTED].

B. Transportation between Timbuktu and Bamako

Support by the United Nations Multidimensional Integrated Stabilization Mission in Mali ("MINUSMA")

15. [REDACTED]
16. Due to the complexity of the above-mentioned procedure, at the time the Court requested [REDACTED] to assist in the [REDACTED].
17. [REDACTED].
18. With regard to MINUSMA's capacity to provide transportation services, it should be noted that although MINUSMA has indeed resumed operations of regional flights as of 1 August 2020 with three flights per week to major regions cities, [REDACTED].
19. Should the Chamber decide to issue a cooperation request to the UN, the Registry stands ready to immediately initiate an informal discussion on its capacity to provide the transportation services.

C. Detention

Detention by the Malian authorities and their cooperation

⁶ Annex I.

20. Should the Chamber grant the Defence Request and issue a cooperation request to the Malian authorities to detain Mr Al Hassan in a secure custodial facility in Mali by the competent Malian authorities, provision of the following support would need to be requested from the Malian authorities ("Requested Support") :
- Provision of a secure custodial facility either in Bamako or in Timbuktu which falls under the responsibility of the Malian Minister of Justice where the ICC detention regime would apply allowing the ICC to continue to exercise overall supervisory authority over Mr Al Hassan's custody for the duration of the visit.
 - [REDACTED].⁷
 - Implementation of all necessary COVID-19 mitigating measures by the identified custodial facility authorities including the imposition of quarantine upon arrival and/or administration of a COVID-19 test on Mr Al Hassan.
 - Maintenance of the confidentiality of the Court's request for cooperation and the detention of Mr Al Hassan in Mali, except to the extent that the disclosure is necessary for execution of the request.
 - Consultations with the ICC. Should the Malian authorities identify problems which may impede or prevent the execution of the request, the State should consult with the Court without delay in order to resolve any issues.
21. Prior to any consultation with the Malian authorities, the Registry has no knowledge about whether the Malian authorities could provide a custodial facility where the custody of the court arrangement and restrictions on communications ordered by the Chamber could be easily implemented. Upon receipt of the Court's cooperation request, the Malian authorities will need to first conduct an extensive feasibility analysis.

Detention at the ICC-DC

⁷ Trial Chamber X, [REDACTED].

22. If the Request is granted, based upon medical advice, Mr Al Hassan would need to observe a mandatory quarantine period of 14 days upon return to The Netherlands. [REDACTED].

Current situation in Mali

23. At the time of writing, the Malian government is encountering significant challenges. [REDACTED]. In addition, Mali is currently hit by the second wave of the COVID-19 pandemic which is deeply impacting Malian society (Mali has recorded 5,721 cases of COVID-19 and 189 deaths as at 15 December 2020). Therefore on 18 December 2020 the Malian authorities have announced, *inter alia* the following new COVID-19 measures:

- State of emergency nationwide as of 19 December 2020 (not only due to the COVID-19 pandemic but also the persistent terrorist activities imposing risk to the security of people and their property).
- Suspension of public hearings in courts until 16 January 2021.
- Prohibition of festivals and cultural events.
- Closure of shopping streets, leisure places such as bars, restaurants and nightclubs from 19 December 2020 at midnight.
- Closure of schools until 4 January 2021.
- Mandatory wearing of masks in public spaces and transportation means, and systematic sanction of non-compliance.
- Limitation of public gatherings to a maximum of 50 people.
- Enhancement of control over air and land borders.
- Extension of remote working and rotations system to private sector enterprises with more than 50 employees.⁸

24. [REDACTED].

⁸ Annex II.

25. Further details regarding the current situation in Mali are provided in the attached Mali situation report prepared by the Country Analysis Unit within the Registry.⁹
26. Should the Chamber grant the Request and issue a cooperation request to the Malian authorities to detain Mr Al Hassan in a secure custodial facility in Mali by the competent Malian authorities, the Registry stands ready to closely follow up with the Malian authorities on the execution of the said cooperation request.

D. Detention by MINUSMA

Cooperation from the UN/MINUSMA

27. [REDACTED].
28. With regard to creating a detention facility in the MINUSMA compound, [REDACTED].
29. In general, in light of MINUSMA's reduced capacity due to the COVID-19 pandemic, the Registry does not foresee that it will have the capacity to perform either the creation of a detention facility within the MINUSMA compound or the negotiation with the Malian authorities to allow it to administrate a custodial facilitate in Mali to detain Mr Al Hassan. [REDACTED].
30. However, should the Chamber grant the Request, the Registry stands ready to conclude an agreement between the Court and the UN and to transmit to the UN an official request for cooperation issued by the Chamber in line with the above-mentioned procedure. In view of efficiency, the Registry would also immediately initiate an informal consultation with MINUSMA on their feasibility to provide the requested services.

⁹ Annex III.

E. Medical facilities in Mali

31. In general, due to limited capacity of its public health infrastructures, Mali remains particularly vulnerable to the COVID-19 pandemic. Prior to any consultation with the Malian authorities, the Registry is not in a position to ensure that Mr Al Hassan would be able to access the same medical facilities as the one he can access in the Netherlands should he be detained in Mali. Should Mr Al Hassan require urgent medical treatment, the Registry would not be able to facilitate his timely medical evacuation if he is detained in Mali.

F. Impact on witness protection

32. Witness related operations are expected to [REDACTED] following resumption after the Court recess. The Victims and Witnesses Unit (“VWU”) maintains that Mali remains both a high threat and risk environment for witnesses, [REDACTED].
33. The VWU considers that should the Chamber grant the Request and [REDACTED] regarding the detention of Mr Al Hassan in Mali, that interest in both Mr Al Hassan and his case in Mali will be impacted. An increase in the interest in Mr Al Hassan or his case in Mali, [REDACTED].
34. The situation is further complicated following the recent exchange of prisoners in Northern Mali. [REDACTED]. Some of these persons are directly related or are known to closely support threat actors, with a real risk existing that those persons have rekindled prior relationships with threat actors.
35. In response to the COVID-19 environment, the need [REDACTED]. Should the Chamber grant the Request, the VWU would need to reconsider the nature of its operations [REDACTED].
36. While the Request indicates that the same conditions of detention would apply in Mali, the VWU notes that [REDACTED] weigh heavily on threat and risk assessments. In the absence of information concerning the proposed conditions of detention in Mali, any minor change in the detention regime in Mali

potentially reduces the effectiveness or [REDACTED]. If the Chamber grants the Request, the VWU will need to request additional time to update current assessments and operational methodologies.

G. Impact on the ICC missions

37. Should the Chamber grant the Request, [REDACTED].
38. [REDACTED].
39. Consequently the profile and the visibility of the Court in Mali will increase and [REDACTED]. Such scenario could lead to a change in the dynamics of security risk management, in a context in which ICC may become directly targeted, compared to the current situation [REDACTED].

Can the Registry offer any alternative modes of contact with the family?

40. Without prejudice to the course of action the Chamber will deem to be most appropriate, and taking into account the current context, the Registry has also contemplated alternative means of communication that may also assist Mr Al Hassan at this difficult time and which may be considered by the Chamber, namely video conferencing.
41. In this regard, the Registry may be able to exceptionally request the assistance of [REDACTED] to assist the family of Mr Al Hassan on site. The Registry has [REDACTED]. Therefore two scenarios could be further explored if deemed appropriate by the Chamber. The first would entail travel of the family of Mr Al Hassan to Bamako to be exceptionally facilitated [REDACTED] in order for the Registry to further facilitate the video conferencing from Bamako between the family and Mr Al Hassan [REDACTED]. In the second scenario [REDACTED] would be able to facilitate the video conferencing for the family [REDACTED]. The Registry suggests that such video call would be limited to some family members already approved by the Registry.

42. Should the Registry be instructed to put in place either of the suggested arrangements, further steps would be necessary. [REDACTED].¹⁰ Alternatively, the Chamber may also consider the current exception to the established regime in relation to the current contacts between Mr Al Hassan and his family on the subject of the death of his daughter.
43. Additionally, the Registry is currently implementing Chamber's Decision ICC-01/12-01/18-786-Conf, para. 39 directing the Registry "to make available to Mr Al Hassan the family videos". [REDACTED].
44. Furthermore, it may be worth clarifying that at this time, the Registry is not exploring the possibility of an in-person family visit, as considering the current pandemic this is at this time not a viable arrangement. In this regard the Registry informs the Chamber that following regulation 96(2) of the RoC, the Presidency approved an extension of the DC COVID-19 measures [REDACTED]. The DC COVID-19 measures are based on the need to mitigate the risks for detained persons under the care of the ICC during this pandemic, which is of the upmost priority for the Registry. All visits to detained persons, including family visits, are exceptionally temporarily suspended in order to mitigate exposure to COVID-19. The resumption of family visits at the DC will depend on the evolution of the COVID-19 pandemic, in particular the seriousness of infection rates in the general population of the host State and the situation globally. It is of note that the Netherlands has just entered a strict lockdown with cases rising to over 9,000 per day.¹¹
45. With regard to the matter of vaccinations, in its request, the Defence states that "[t]he Registry has further indicated that family members of detainees will not be permitted to enter the ICC detention unit until all the ICC detainees first receive a vaccine"¹² (para.15), without citing the source of this information. The Registry clarifies that this is not the Registry's policy nor the position of the

¹⁰ Trial Chamber X, [REDACTED].

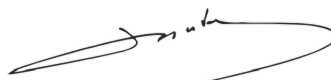
¹¹ Please note <https://www.rivm.nl/en/novel-coronavirus-covid-19/current-information>.

¹² Defence, "Urgent Request for Custodial Visit on Compassionate Grounds" 17 December 2020, ICC-01/12-01/18-1212-Conf, para.15.

Medical Officer of the DC. Vaccination protocols at the DC will depend upon the development of the host State protocols, the host State prison (DJI) protocols and any decisions to be made by the ICC. The resumption of family visit therefore does not depend on the vaccination of all detained persons but rather depends on the general COVID risks as mentioned above. Nevertheless, a vaccine available to the global and host State population may have a significant impact in reducing the spread of COVID-19 and therefore its risks to the detained persons.

VI. Conclusions

46. In light of the Registry submissions detailed above, prior to any consultation with the Malian authorities and the UN, the Registry's preliminary assessment is that implementation of the Request would be extremely difficult at this time due to the challenges currently being encountered by the Malian Government and MINUSMA. In addition, Mr Al Hassan's detention in Mali may lead to [REDACTED].
47. The Registry has additionally provided an alternative for the Chamber to consider, namely video-conferencing as specified in the present submission.
48. Should the Chamber decide to grant the Request, the Registry stands ready to transmit an official request for cooperation to the Malian authorities and/or MINUSMA as indicated above and immediately initiate consultation with them for the execution of the Chamber's request.



Marc Dubuisson
Director Division of Judicial Services
on behalf of Peter Lewis, Registrar

Dated this 15 January 2021

At The Hague, The Netherlands